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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANZ GREY,

Defendant and Appellant.

B206600

(Los Angeles County
Super. Ct. No. BA314171)

APPEAL from a judgment of the Superior Court of Los Angeles County,
William C. Ryan, Judge. Affirmed.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant
Attorney General, Paul M. Roadarmel, Jr., and Eric J. Kohm, Deputy Attorneys General,
for Plaintiff and Respondent.

After being granted the right to represent himself, Franz Grey pleaded guilty to leaving the scene of an accident and possession of cocaine base. At a post-conviction hearing Grey stipulated to payment of \$46,686.96 in victim restitution. On appeal Grey contends the trial court violated his federal and state due process rights by failing to reconsider the restitution award after he presented information his stipulation was the product of duress. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Grey's Plea Agreement

On December 17, 2006 the car Grey was driving crashed, skidded onto the sidewalk, hit various signs, poles, newspaper stands and benches and struck Howard Kahan, who was riding his bicycle on the sidewalk. After coming to a stop and pinning the bicycle to a storefront window, Grey drove away with a dented hood, cracked windshield, two or three popped tires and a broken axle. An eyewitness called the police emergency number. Grey was apprehended two or three miles from the accident. Los Angeles Police Department officers found a usable amount of cocaine base in Grey's pocket, as well as smoking paraphernalia with a white residue. A urine sample taken from Grey about six hours after the accident tested positive for cocaine metabolite.

Kahan was taken to the hospital and treated for a partially collapsed lung, a fractured left ankle and cuts and bruises. Kahan was in the hospital for three days and required follow-up treatment after his discharge.

On January 3, 2008 Grey, representing himself in propria persona,¹ pleaded guilty to leaving the scene of an accident (Veh. Code, § 20001, subd. (a)) and possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)). In taking the plea the court specifically advised Grey, "[T]here were some injuries and some damages that the victim in this case suffered. You will be responsible for whatever restitution is owing to that victim." Pursuant to the terms of a negotiated agreement, the People dismissed the

¹ On August 1, 2007 the trial court granted Grey's motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

charge of driving under the influence of an alcoholic beverage and a drug, causing injury to Kahan (Veh. Code, § 23153, subd. (a)), and dismissed the special allegations Grey had suffered a prior serious felony conviction within the meaning of the “Three Strikes” law (Pen. Code, §§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and had inflicted great bodily injury on Kahan (Pen. Code, § 12022.7, subd. (a)). Grey was sentenced to an aggregate state prison term of three years and eight months.

2. The Restitution Hearing

On January 10, 2008 the trial court held a hearing to determine the amount of victim restitution owed by Grey pursuant to Penal Code section 1202.4.² The People initially asserted Kahan had incurred \$69,182.83 in expenses, comprised of \$65,342.50 in hospital charges, \$50 for the ambulance, \$53 for crutches, \$2,725.20 for lost wages and \$1,012.13 for the destroyed bicycle. The court, however, found the documentation for the hospital charges appeared to include duplicate billings. Reducing the amount for hospital charges by nearly \$8,000 and adding the various non-hospital charges, the court concluded the amount of properly documented expenses was \$61,686.90, an amount to which Kahan agreed. After further reducing this amount by \$15,000, the sum Kahan had recovered from Grey’s insurance company, the court determined Kahan was entitled to \$46,686.96, which Grey stipulated to pay.

² Penal Code section 1202.4, subdivision (f), provides, “Except as provided in subdivisions (q) and (r), in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. . . . [¶] (1) The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant. If a motion is made for modification of a restitution order, the victim shall be notified of that motion at least 10 days prior to the proceeding held to decide the motion.”

3. The Motions for Reconsideration and for Appointment of Counsel

On January 22, 2008 Grey filed a “motion for reconsideration of restitution,” contending he had stipulated to the amount of restitution “under [duress] from the extremely dangerous situation of being placed in a holding tank with the dangerous Mexican gang members” and “was more concerned with the safety of his life than the amount of restitution owed to the victim.” Consequently, “under further rational consideration without the immediate danger from being the only white inmate packed in a cell with 60 Mexican gang members,” he had concluded he could not “reasonably stipulate to the \$46,000 amount.” Grey requested appointment of counsel to represent him in contesting the amount of restitution because he was no longer permitted access to the prison law library to research the matter. Grey also filed a separate motion for appointment of counsel. The trial court did not rule on either motion.

4. The Notice of Appeal

On February 27, 2008 Grey filed a notice of appeal stating “[t]he amount of restitution in the above case is incorrect.” In a declaration filed in support of his notice of appeal, Grey stated, “It has recently come to my attention that the victim in my case had signed a paid in full regarding the \$15,000 settlement from my insurance company. The victim agreed to not pursue any more money after accepting the \$15,000 settlement. Also the victim did not actually incur \$61,000 in medical bills and cannot show actual receipts incurring this actual financial loss. Defendant stipulated under duress from the violence and dangerous atmosphere and [threats³] from deputies at the L.A. County Jail.”

DISCUSSION

1. The Trial Court Did Not Abuse Its Discretion in Setting the Amount of the Restitution Award

Liberally construing Grey’s self-prepared, handwritten notice of appeal, which asserts the amount of restitution ordered by the trial court is incorrect, as at least in part an appeal from the court’s January 10, 2008 restitution order, we affirm the order as well

³ Only the letters “thre” are legible; but, read in context, we assume Grey wrote “threats.”

within the trial court's discretion. (See *In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132 ["standard of review of a restitution order is abuse of discretion"].)⁴

"[T]he court's discretion in setting the amount of restitution is broad, and it may use any rational method of fixing the amount of restitution as long as it is reasonably calculated to make the victim whole." (*People v. Baker* (2005) 126 Cal.App.4th 463, 470.) "There is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; accord, *People v. Bernal* (2002) 101 Cal.App.4th 155, 162-163.)

At the restitution hearing documentary evidence was presented regarding the victim's medical bills, the cost of his bicycle and his other claimed expenses. The record demonstrates the trial court carefully analyzed Kahan's medical bills, concluding almost \$8,000 was not supported by the documentation, and reduced the award by that amount. There was no evidence before the court at the January 10, 2008 hearing that Kahan had agreed to limit his claim for restitution to the sum recovered from Grey's insurance company nor was there any evidence that Grey's stipulation to the amount determined by the court was the product of duress. Thus, there was an adequate factual and rational basis for the restitution award as entered.

⁴ Although Grey's convictions are based on his plea of guilty, his plea agreement did not specify the amount of victim restitution. Accordingly, no certificate of probable cause is needed to appeal from the court's post-plea determination of that amount. (Cal. Rules of Court, rule 8.304(b)(4)(B) [defendant need not obtain certificate of probable cause under Pen. Code, § 1237.5 if appeal is based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity"]; see *People v. Panizzon* (1996) 13 Cal.4th 68, 74 [certificate of probable cause not required if defendant asserts "issues regarding proceedings held subsequent to the plea for the purposes of determining the degree of the crime and the penalty to be imposed"]; see also *People v. Kunitz* (2004) 122 Cal.App.4th 652, 657-658.)

2. Grey's Challenge to the Trial Court's Failure To Rule on His Postjudgment Motions Cannot Be Raised on Appeal

Grey's principal argument on appeal is not that the trial court erred in setting the amount of restitution at the January 10, 2008 hearing, but that the court violated his due process rights by failing to schedule a hearing or to rule on his subsequent motion for reconsideration of that award, which asserted he was acting under duress caused by oppressive conditions of incarceration when he had agreed to pay Kahan the net amount of \$46,686.96 in victim restitution. (See *People v. Downey* (2000) 82 Cal.App.4th 899, 912 [“[f]ailure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal”].)⁵ The premise for Grey's motion is faulty. As discussed, the trial court acted within its discretion in determining the amount of victim restitution to be awarded to Kahan. Grey's agreement to pay that amount, after it was calculated by the court based on the evidence presented on behalf of Kahan by the People, was unnecessary and without legal significance.

Moreover, Grey's claim that at the time of the restitution hearing he was frightened because he had been placed in a holding cell with “dangerous Mexican gang members,” even if true, is insufficient to establish duress or justify setting aside the award. Duress requires proof the defendant acted in response to a demand or request (express or implied) because of threat or menace that reasonably led him or her to believe his or her life (or someone else's) would be in immediate danger if he or she refused the demand or request. (See *People v. Heath* (1989) 207 Cal.App.3d 892, 900; see generally CALCRIM No. 3402 [duress or threats].) Thus, in the century-old case of *People v.*

⁵ Grey's additional claim his insurance company's payment of \$15,000 to Kahan was conditioned on Kahan's agreement not to seek any additional compensation for his injuries was not presented to the trial court in the motion for reconsideration and is not addressed in his briefs in this court. We need not consider it further. (See *Osorio v. Weingarten* (2004) 124 Cal.App.4th 304, 316 [“[i]ssues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived”]; *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [appellate court “will not develop the appellants' arguments for them”].)

Perez (1908) 9 Cal.App. 265, upon which Grey places heavy reliance, the appellate court held a guilty plea extorted by fear of violence (that is, “duress”) could be set aside if the trial court believed the defendant’s contention he was told by the sheriff he was in imminent danger of mob violence and the only way to protect himself was to plead guilty and be immediately taken to the penitentiary. (*Id.* at p. 266.) Here, in contrast, Grey does not claim anyone suggested he would again be confined with dangerous gang members or otherwise placed in immediate danger if he did not acquiesce in the trial court’s determination of the proper amount of victim restitution.

Even more fundamentally, however, Grey’s contention his constitutional rights were violated by the trial court’s failure to schedule a hearing and to rule on his motions for reconsideration and appointment of counsel is not cognizable on appeal. Grey does not seek review of his judgment of conviction (see Pen. Code, § 1237, subd. (a) [appeal may be taken by defendant from a final judgment of conviction]) or challenge a post-conviction or postjudgment order (see Pen. Code, § 1237, subd. (b) [appeal may be taken by defendant “[f]rom any order made after judgment, affecting the substantial rights of the party”]), but rather attempts to compel the trial court to act in the face of its previous inaction. The proper procedure to seek that relief is a petition for writ of mandamus (see *Burnett v. Superior Court* (1974) 12 Cal.3d 865, 869 [“law is well settled that a trial court is under a duty to hear and determine the merits of all matters properly before it which are within its jurisdiction and that mandate may be used to compel the performance of this duty”]; accord, *Safai v. Safai* (2008) 164 Cal.App.4th 233, 242) after first requesting the trial court to act (see *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 372 [“[b]efore seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act”]; accord, *Safai*, at p. 243).

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.